IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 18TH OCTOBER 2007 / 26TH ASWINA 1929

CRL.A.No. 1947 of 2003()

SC.523/2000 of ADDL.SESSIONS COURT (ADHOC I), KASARAGOD

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APPELLANT: ACCUSED

K.BABU S/O. UGGAPPA POOJARI,
AGED 47 YEARS, KARANDAKKADU, KASARAGOD.

BY ADVS. SRI.T.SETHUMADHAVAN
SRI.PUSHPARAJAN KODOTH
SRI.K.JAYESH MOHANKUMAR

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. THOMAS JOHN AMBOOKKAN

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18/10/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER IN CRL.M.A. NO.12472 OF 2003 IN CRL. APPEAL NO. 1947 OF 2003.

DISMISSED

18.10.2007 Sd/-(K.THANKAPPAN, JUDGE)

K.THANKAPPAN, J.

CRL. APPEAL NO. 1947 OF 2003

Dated this the 18th day of October, 2007

JUDGMENT

The appellant - accused in S.C. No.523 of 2000 on the file of the Additional Sessions Court (Ad hoc I),Kasaragod, challenges the judgment of the trial court by which he was found guilty under Section 55(a) of the Abkari Act, convicted thereunder and sentenced to undergo rigorous imprisonment for three and a half years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of three months.

2. The prosecution case against the appellant - accused was that on 4.2.2000 at 4.50 p.m., the accused was found in possession of 25 litres of spirit in a cannas of about 35 litre capacity without any authority under the provisions of the Abkari Act. To prove the charge against the accused, the prosecution examined PWs.1 and 2 and produced Exts.P1 to P5. on the side of the defence, Exts.D1 and D2 were produced, but no witnesses were examined. After closing the prosecution evidence, the accused was

questioned under Section 313 Cr.P.C. Denying the prosecution charge, he stated that he was innocent and that the case was foisted against him by the police. The trial court, relying on the evidence of PW.2, the Sub Inspector of Police who detected the offence, investigated the case and filed the final charge sheet against the appellant - accused, found that the prosecution succeeded in proving that the accused was found in possession of 25 litres of spirit on the day of the incident.

3. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. The finding of the trial court is challenged by the learned counsel appearing for the appellant on the following grounds: (i) the trial court ought to have found that the prosecution had not proved the case against the appellant - accused beyond reasonable doubt as the only evidence adduced by the prosecution was that of PW.2, the investigating officer, (ii) the evidence of PW.2 would not show that the alleged seizure of 25 litres of spirit on 4.2.2000 was from the premises of House No.KMC II/167 or that the said house belonged to the appellant and (iii) PW.2 had not complied with the provisions of the Abkari Act and the Kerala Excise Manual while detecting the offence and taking the samples as there were

no independent witnesses present during the relevant time and samples taken were also not properly sealed or labelled.

5. The trial court relied only on the evidence of PW.2. Though PW.1 was examined to prove that the cannas containing spirit was seized in his presence, this witness stated that he had not seen anything being seized from the appellant or from the house of the appellant. In the above circumstances, the evidence of PW.2 has to be analysed carefully. The evidence of PW.2 would show that when he reached the place of occurrence on getting information that the appellant - accused was keeping spirit in his house, he saw the appellant standing in the courtyard of the house and on conducting a search of the premises of the house, he found a cannas hidden beneath coconut husks in a shed situated about seven meters away from the house. PW.2 stated before the court that the appellant had told him that the house belonged to him and it was he who had hidden the cannas beneath the coconut husks. When cross-examined, this witness had stated that he had not conducted any investigation regarding the ownership of the house. He also stated that he had not verified the ration card or any other records of the appellant. PW.2 also admitted that even though there were inmates in the house, none of them were examined and that arrest memo was not served on any of the inmates

of the house. That apart, the specific case of the appellant - accused when he was questioned under Section 313 Cr.P.C. was that the house does not belong to him. Further, Exts.D1 and D2 would show that the appellant was residing away from the place of occurrence. The trial court had not considered these aspects. Further, it is to be noted that though PW.1 and another witness had signed Ext.P1 seizure mahazar, only PW.1 was examined and he stated that he had signed Ext.P1 at a hotel and not at the place of occurrence as spoken to by PW.2. In the above circumstances, this Court is of the view that the reliance placed by the trial court on the evidence of PW.2 is not sufficient to prove that the house from the premises of which the cannas was seized belonged to the appellant - accused.

6. It is also seen from the property list that all the items were produced before the court only on 7.2.2000 and the learned Magistrate after verifying the items returned the same for safe custody. PW.2 had not stated anything regarding the safe custody of the articles seized from the appellant - accused. He only stated that he had sent the forwarding note for sending the samples for chemical analysis. But it is seen that Ext.P4 forwarding note does not contain any date. This coupled with the delay in producing the materials before the committal court creates doubt

regarding the evidence of PW.2. Further, it is also not stated in Ext.P1 seizure mahazar whether any sample was taken by PW.2 at the place of occurrence and labelled the same in the presence of any witnesses. All these circumstances would clearly show that the finding of the trial court that PW.2 proved the prosecution case is not supported by any legal evidence and hence not acceptable.

7. One more aspect to be considered is that as per the provisions of the Abkari Act and the Kerala Excise Manual, it is the duty of the investigating officers or the excise officers who detect the offence to get the presence of independent witnesses while seizing the contraband articles and taking samples. Of course, there is no legal bar for the prosecution to prove its case only on the evidence of the investigating officer, if such evidence is otherwise free from doubt. This Court has already found that the evidence of PW.2 is not free from doubt. The prosecution only proved the presence of the appellant - accused in the courtyard of the house, but not the ownership of the house. In the above circumstances, this Court is of the view that the evidence adduced by the prosecution is not sufficient to hold that the prosecution succeeded in proving the case against the appellant. The appellant is, therefore, entitled to the benefit of doubt.

8. Accordingly, the finding entered by the trial court and the conviction and sentence ordered against the appellant are set aside. The appellant is acquitted of all the charges levelled against him.. If the appellant has deposited any amount, that shall be refunded to him.

The Crl. Appeal is allowed as above. The bail bonds executed by the appellant shall stand cancelled.

(K.THANKAPPAN, JUDGE)

sp/

K. THANKAPPAN, J.

CRL.A. NO.

JUDGMENT

OCTOBER, 2007